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Practice Group(s):
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Arrival of Ebola Virus Prompts Policyholders to Assess Insurance Coverage

Global Insurance Coverage Alert

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With news of the Ebola virus arriving in the United States, many companies are moving quickly to protect the health and safety of their employees and customers. At the same time, some insurance providers have already cautioned policyholders that, in their view, many standard policies will not respond to Ebola-related events, while encouraging businesses to purchase new, Ebola-specific coverages. In light of such comments, it is particularly important that companies with significant Ebola-related risks—including, but not limited to, hospitals and other medical-related operations—take time to consider whether they have appropriate insurance coverage in place. For companies that have already been affected by Ebola, it is especially important that they act promptly to preserve their ability to pursue claims under their insurance policies.

With the situation still unfolding across the international stage and a lack of caselaw applying policy language to Ebola-related claims, it is impossible to predict with certainty how insurance coverage might be implicated and which policy language might be disputed. However, some potential insurance coverage scenarios are not difficult to envision. For example, a medical care provider might be sued in connection with its treatment of an Ebola patient or its handling of Ebola-contaminated materials. The provider might look to its general liability policies, errors and omissions (“E&O”) policies, or, potentially, in some circumstances, directors and officers liability (“D&O”) policies to respond to such claims. Will an insurer argue that various exclusions or other policy language—either general provisions already in place or Ebola-specific language that an insurer might attempt to introduce in a policy renewal—bar coverage?

As another example, a medical facility that has treated a patient with Ebola might be placed under a regulatory quarantine, forcing the suspension of its regular operations. Does the facility’s contamination with Ebola constitute property damage under a business interruption insurance policy, such that coverage might be available with respect to lost income resulting from the quarantine?

These are just a few of the types of issues a policyholder might take into consideration in reviewing their insurance coverage programs for readiness with respect to Ebola-related risks. The following lists suggest practical steps a company might take in, first, analyzing the availability of coverage for potential Ebola-related claims and, second, responding to such a claim. In both cases, prompt action is likely to benefit the policyholder’s insurance position.

Assessing Coverage for Ebola-Related Risks

- Review terms of potentially applicable policies. Such policies might include general liability policies; property insurance policies, including all risk policies and “business interruption” and related coverages; E&O/professional services policies; and D&O

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policies, among others. The policyholder should attempt to identify any language, including exclusions, that an insurer might argue bars coverage for Ebola-related claims as well as language that may afford coverage, particularly broadly defined E&O/professional services policies.

- Strategy on policy renewals. Even if existing policy language appears to provide coverage for Ebola-related claims, an insurer might seek to introduce an exclusion or other restrictive policy language when a policy is to be renewed. In such a case, the policyholder might seek to negotiate for a renewal without the restrictive language, seek coverage through an alternative provider who does not insist on the restrictive terms, or seek, to the extent practicable, to “lock-in” coverage under expiring terms of coverage affording more favorable terms. In addition, questions raised by insurers in the renewal process regarding Ebola can, if answered inaccurately in the insurers’ view, give rise to potential insurer coverage defenses based on “misrepresentation” or similar principles.
- Consider specialty Ebola policies. Depending on the terms of a company’s existing policies and the nature and extent of its particular Ebola-related risks, it might be appropriate to obtain specialty Ebola coverage, which is already being offered through some brokers. The business should closely review the terms of any such policy to understand the types of claims it will and will not cover. In addition, care should be taken in pursuing such coverage to avoid allowing for a negative (and quite possibly inappropriate) inference that the existing policies do not cover Ebola-related claims or losses.
- Ensure appropriate policy limits and retentions. A company with elevated risks related to Ebola should consider whether, in light of national and global developments, its current policy limits are sufficient for its operations, as well as whether the self-insurance features of the programs (e.g., deductibles, self-insured retentions, and retrospective premiums) are appropriate.

Responding to Ebola-Related Claims

- Identify any potentially applicable policies. As noted above, a variety of policy types might respond to a particular Ebola-related claim. The policyholder should pay particular attention to the “triggering” language of policies. Many current policies are written on a “claims-made” or similar basis, meaning they are triggered by the assertion of a “claim” or similar event, rather than by the occurrence of an injury or act giving rise to an injury. Accordingly, an Ebola-related “event” taking place in 2014 might be covered by a 2015 policy, if that is when a claim based on the event is first asserted against the policyholder. That said, the happening of the “event” may provide an opportunity for a policyholder to “lock-in” coverage in certain circumstances.
- Closely review insurance policies. This review should focus not only on substantive policy terms, including exclusions, but also on any timing requirements that might result in a waiver of the policyholder’s claim.
- Promptly notify insurers. A policyholder may risk waiving coverage if it fails to timely notify its insurers of a claim, or even a potential claim, pursuant to the terms of the policy. Determining which policies to notify is not, however, in all instances a straightforward exercise, and, accordingly, attention to policy wording is warranted.

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- Cooperate with insurers. Insurers typically contend that policyholders have an obligation to cooperate with insurers in the investigation, settlement, and defense of claims. While an Ebola-related claim might implicate certain sensitive or confidential information relating to the policyholder or third parties, a policyholder will wish to consider its cooperation duties require providing access to such information.
- An integrated strategy. Ebola may present challenges on multiple levels going beyond insurance – legal, regulatory, disclosure-related, business vulnerability, and the positions and interests of the company may at times vary among these different challenges. A prudent policyholder may wish to consider the insurance-related implications with respect to its positions, particularly its public positions, in formulating its overall strategic approach.

Conclusion

As the Ebola situation develops, businesses should act promptly to assess their insurance positions and take any actions that might be warranted. K&L Gates maintains one of the world's largest insurance coverage practice groups, and its attorneys have represented a wide variety of policyholders under uncertain circumstances like those presented by the Ebola virus.

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